Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	ET Docket No. 93-266
Review of the Pioneer's Preference Rules	)	
	)	

REPLY COMMENTS OF MOBILE TELECOMMUNICATION TECHNOLOGIES CORPORATION

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SUMMARY

In this proceeding, the Commission is reviewing its Pioneer's Preference policies in light of recent legislation authorizing the use of competitive bidding to select from among mutually exclusive applicants. The Commission has concluded from the outset of this proceeding, however, that existing final Pioneer's Preference awards will not be subject to any potential modifications adopted in this review. The Commission's determination that existing final awards are beyond the scope of rulemaking appropriately reflects the inequity of upsetting or modifying awards that, due to finality, have been substantially relied upon by the preference holder.

A number of Mtel's existing and potential competitors have used the Notice as an opportunity to attack once again the award to Mtel notwithstanding the Commission's clear statement that such comments were inappropriate. Even if these comments could be construed as within the proper scope of the Notice, however, they offer no valid public policy reasons for upsetting the Commission's balancing of equities in Mtel's specific case. Mtel has invested significant resources in developing the technology and service for which it was granted a preference and, in the process, revealed its technology to its competitors. Mtel has also structured its business relationships and deployment plan in recognition of the Commission's finalization of its award. This reliance should not be upset absent the most compelling circumstances.

In view of the Commission's past policies regarding retroactivity, the equities dictate that Mtel's final Pioneer's Preference must be left to stand. Parties commenting fail to provide any basis for the Commission to reverse substantial precedent disfavoring retroactive rulemaking. Indeed, such a reversal is questionable as a matter of law as well as a matter of public policy.

In addition, Congress's recent grant of authority to the FCC to use a competitive bidding process in awarding certain parts of the spectrum does not change the basis for computing other fees for licenses awarded in other contexts. The terms of the grant are quite limited; competitive bidding can only apply when "mutually exclusive applications are accepted for filing." Because Pioneer's Preference holders do not submit mutually exclusive applications, such applicants are not subject to competitive bidding--or to fees based on competitive bidding.

TABLE OF CONTENTS

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Mobile Telecommunication Technologies Corporation ("Mtel"), by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding.[1] Mtel notes that the Commission has already decided that Mtel's final Pioneer's Preference is not a subject of this rulemaking proceeding. The Commission stated "as a matter of equity, nothing in this review will affect these [finalized Pioneer's Preference] proceedings."[2]

Despite these unambiguous directions, several of Mtel's potential competitors view this rulemaking as yet another opportunity to air their repetitive assertions that Mtel's preference award is unjustified or unwarranted. As discussed below, these comments are outside the scope of this rulemaking, and, in any event, do not advance any legitimate public interest grounds for modifying Mtel's preference. Furthermore, there is no legal basis for compelling auction level fees from a final

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[1] Review of the Pioneer's Preference Rules, ET Docket No. 93-266 (Oct. 21, 1993) ("Notice").

[2] Id. at ¶ 18.

Pioneer's Preference grantee either retroactively or prospectively.

I. AS THE NOTICE EXPRESSLY STATES, RETROACTIVE MODIFICATION OR RESCISSION OF MTEL'S FINAL PREFERENCE IS OUTSIDE THE SCOPE OF THIS RULEMAKING

The Commission has made a clear pronouncement that any changes to the Pioneer's Preference rules and policies that might be adopted in this proceeding would not be applied to final Pioneer's Preference grantees. The Commission's order states, quite plainly, that "as a matter of equity, nothing in this review will affect these [finalized Pioneer's Preference] proceedings."[3] Because Mtel's final Pioneer's Preference was granted on July 23, 1993,[4] nearly three months prior to the issuance of the instant notice, modifications to, or rescission of, Mtel's Pioneer's Preference is outside the scope of this proceeding.

Nonetheless, a number of Mtel's existing and potential competitors have seized upon the Notice as yet another avenue for their tactics to impede the delivery of advanced NWN service to the public.[5] BellSouth, in particular, has filed an "emergency motion" in this docket that attempts to convert this proceeding

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[3] Id.

[4] New Narrowband Personal Communications Services, FCC 93-253 (rel. July 23, 1993).

[5] Comments of BellSouth; Comments of Paging Network, Inc.; Comments of Pagemart, Inc.

into a forum on Mtel's application for service.[6] BellSouth's actions in this regard are particularly ironic, in light of its having filed a Pioneer's Preference request virtually cloning Mtel's own application.[7] Once its application was rightfully rejected, BellSouth subsequently turned its massive legal resources to attempting to defeat the Pioneer's Preference policies--and Mtel's award--at every conceivable opportunity.

The efforts by commenters to reopen Mtel's final Pioneer's Preference should not be condoned. They are designed solely to delay Mtel's introduction of service and misuse the Commission's processes. The Commission should thus promptly reject such efforts to relitigate previously resolved policies and issues.

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[6] Mtel has responded to the unfounded allegations in BellSouth's "emergency motion" in a separately filed Opposition. Opposition of Mobile Telecommunication Technologies Corp. to BellSouth Emergency Motion to Return Mtel Application (filed November 22, 1993).

[7] Mtel has previously filed comments describing the extensive similarities between its Pioneer's Preference application and the Pioneer's Preference application of MCCA, a BellSouth subsidiary. See Opposition of Mobile Telecommunication Technologies Corp., ET Docket No. 92-100 (filed June 19, 1993). The appropriation of Mtel's design--and even language--renders BellSouth's comment that "[t]he first filer has an advantage in the ensuing public relations contest, because it can use the fact that it filed first to portray itself as an innovator and belittle subsequent filers as mere copiers and counterfeiters" particularly unseemly. BellSouth Comments at 10.

II. RETROACTIVE ALTERATION OF MTEL'S PIONEER'S PREFERENCE AWARD WOULD BE BOTH IMPROPER AND UNLAWFUL UNDER WELL RECOGNIZED COMMISSION AND COURT PRECEDENTS

Mtel's Pioneer's Preference award is the culmination of an extensive, focused effort to develop an innovative two-way messaging service. Given the years of testing and perfecting Nationwide Wireless Network, as well as Mtel's grant of a finalized Pioneer's Preference award, it would be grossly unfair and unlawful--as well as totally at odds with Mtel's reasonable expectations--for the Commission to change the terms of the Pioneer's Preference award at this time.

Fortunately, as noted, the Commission has stated that it would be unjust to rescind Mtel's finalized Pioneer's Preference award.[8] It is therefore clear that the revocation and modification of final Pioneer's Preference awards is beyond the scope of this rulemaking proceeding.[9] However, some commenters have nonetheless pursued an end run around the Commission's balancing of the equities, and attempted to cast into doubt the meaning of Mtel's award.[10]

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[8] See supra text accompanying note 3.

[9] The NPRM clearly indicates that rescission or modification of Mtel's finalized Pioneer's Preference is not one of the "subjects" or "issues" involved in this rulemaking procedure. 5 U.S.C. § 553(b)(3).

[10] Some have suggested that, despite its Pioneer Preference award, Mtel should still be forced to pay auction-level licensing fees. See, e.g., Comments of Pagemart, Inc., ET Docket No. 93-266, at 8 (filed November 15, 1993); Comments of

A. Mtel Has Invested Substantial Resources and Exposed Its Technology To Competitors In Reliance On the Commission's Pioneer's Preference Policies

Mtel has invested enormous resources in developing its innovative Nationwide Wireless Network ("NWN") pursuant to the existing pioneer's preference rules.[11] Capital that might have been set aside for use in a spectrum auction (or to pay auction-level fees) was instead invested, as the FCC desired, in research and development in order to create the Nationwide Wireless Network. Additionally, in demonstrating NWN to the Commission, Mtel has also exposed the fruits of its research to competitors. It is only fair, therefore, that the Commission fully protect Mtel's reliance by granting the promised reward, a license at the anticipated cost.

As the agency noted, in order to provide the advanced level of functionality represented by NWN to the public, "Mtel improved[,] by a factor of ten[,] bit transmission rates for simulcast paging, developed the necessary technology, and designed an innovative proposal based upon these improved rates

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Paging Network, Inc., ET Docket No. 93-266, at 12 (filed November 15, 1993); Initial Comments of Southwestern Bell Corporation, ET Docket No. 93-266, at 5 (filed November 15, 1993).

[11] Some disgruntled competitors have argued that Mtel will receive too great a reward. However, as Cox Enterprises has noted, "[t]he problem with this argument is that it overlooks the early, significant and consistent investments of human, technical and financial resources that the pioneers expended in reliance on the Commission's invitation." Comments of Cox Enterprises, Inc., ET Docket 93-266, at 10 (filed November 15, 1993).

and technology."[12] Mtel also developed and refined for NWN a number of highly efficient techniques for maximizing use of the spectrum that will allow NWN to: utilize a nationwide and zonal format for forward channel frequency re-use; employ base receivers on an individual but coordinated basis to permit reverse channel frequency re-use; dynamically control access to system resources; minimize inefficiencies caused by contention inherent in portable generated requests to transmit; and tailor portable unit location and tracking schemes for optimal use of resources. In the FCC's words, these innovations "result in more efficient delivery of current paging services and permit the provision of new messaging and related services."[13]

Developing and testing the innovative technology to realize Mtel's NWN system has been a monumental task. Mtel began its efforts by using advanced computer modeling techniques, and creating new techniques, to develop the theoretical basis for NWN. Mtel's research then progressed to over-the-air testing and research into the characteristics of multicarrier modulation simulcast signals in Oxford, Mississippi, with the Center for Telecommunications Research. Mtel's testing most recently culminated in a closed loop test of an operational developmental NWN system in Dallas, Texas.

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[12] Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, First Report and Order, 8 FCC Rcd. 7162, ¶ 57 (1993) ("Order").

[13] Id. at ¶57.

To date, these efforts represent an investment and commitment of approximately $50 million in NWN development, contracts, and related research. Mtel's efforts have now progressed to the stage where it has entered into definitive contracts with other telecommunication firms, including Motorola, Glenayre, and Wireless Access Group, for construction of NWN base transmitters and mobile devices.

The FCC's Pioneer's Preference policy has been crucial in enabling Mtel to obtain the funding for its NWN system. Without its Pioneer's Preference, Mtel might not have been able to raise capital at the crucial early stages of NWN development. The grant of the preference enabled Mtel to attract $6 million this year for use in deploying NWN through an investment by Kleiner, Perkins, Caulfield & Byers. More recently, Mtel's award of a final preference made it possible for Mtel to raise funding for NWN of $187 million in a recently concluded private offering. These funds are targeted to construct and operate Mtel's Nationwide Wireless Network.

Taken as a whole, Mtel's wide-ranging activities to implement its Nationwide Wireless Network are compelling evidence of Mtel's substantial reliance on its Pioneer's Preference award. For this reason, the Commission was wholly correct in excluding the possibility that Mtel would be affected by rule changes that

it ultimately adopts.[14] "[I]t would be inequitable to apply any change" in the Commission's rules as a result of the new NPRM to this Pioneer's Preference proceeding to Mtel.[15] The agency should reject the request of those who would lead it to act in a manner it so accurately recognizes would be wholly unfair.

B. Retroactive Alteration of the Effect of Grant of a Pioneer's Preference Would Be Improper Under Long Recognized Commission Principles and Precedents

Throughout Mtel's application process, the terms of a Pioneer's Preference award have been clearly elucidated by the Commission's rules.[16] Now some suggest that award recipients should be forced to pay auction-level licensing fees.[17] This inequitable retroactive change would effectively frustrate the purpose of the award, undermining Mtel's reasonable reliance on the agency's representations.[18] Retroactive alteration of licensing fees will also undermine investor confidence in the PCS industry generally. As one investor has commented, "[a]ny

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[14] NPRM at ¶ 18 ("Disposition of pioneer's preference requests were made before Congressional enactment of competitive bidding authority, and as a matter of equity, nothing in this review will affect these proceedings.").

[15] NPRM at n.19.

[16] See 47 C.F.R. §§ 1.402, 1.403, 5.207 (1992).

[17] See supra note 10.

[18] As one commenter put it, the "reward of the pioneer's preference rules . . . will be eviscerated," if pioneers are forced to pay auction-level prices. Comment of Suite 12 Group, ET Docket No. 93-266, at 14 (filed November 15, 1993).

reversal in FCC policy, such as retroactive changing of the rules on the PCS Pioneers, would send a negative signal to the investment community, shattering investors' faith in the FCC and in emerging communications companies, likely making the process of raising capital in the future much more problematic."[19]

Considering these baneful effects, it is little wonder that the Supreme Court has confirmed that "[r]etroactivity is not favored in the law."[20] In fact, hostility to retroactive lawmaking has been a fundamental tenet of Western legal thought.[21] Retroactivity is disfavored because it upsets settled expectations. It undermines the ability of law-abiding citizens to plan and to conform their conduct to the law.

Commissioner Barrett's response to the proposed alteration of the Pioneer's Preference rules regarding 2 GHz PCS reflects

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[19] Comments of Unterberg Harris, ET Docket No. 93-266, at 1-2 (filed November 19, 1993).

[20] Bowen v. Georgetown University Hospital, 488 U.S. 204, 208, (1988).

[21] For example, Roman Law included the principle that "no lawgiver can change his purpose to another's injury." Elmer E. Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775, 775 n.3 (1936) ("Nemo potest mutare consilium sum in alterius iniuriam"). And, as early as 1829, the Supreme Court explained that "[i]t is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated look forwards, not backwards." Reynolds v. McArthur, 27 U.S. 417, 434; 2 Peters 416, 434 (1829). Justice Story took a similarly dark view of retroactivity in his "Commentaries on the Constitution." he wrote "retrospective law are . . . generally unjust, and . . . neither accord with sound legislation nor with the fundamental principles of the social contract." J. Story, Commentaries on the Constitution § 1398 (1851).

this long-standing tradition. He aptly declared that the Commission was adopting "the ultimate public policy 'bait and switch'."[22] The bait, of course, was the certainty of a license award, with payment of the customary fees, for those applicants able to put together a sufficiently innovative proposal. With the Commission having encouraged Mtel to pour its resources into PCS research and development, the commenters would now have the Commission "switch" by depriving Mtel of the benefits of its efforts.

As Commissioner Barrett recognizes, it is wrong to change the rules after the game has already been played. Reasonable reliance interests must be protected.[23] The Commission itself has in the past acknowledged the inequity of changing laws governing parties who have substantially relied on past FCC

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[22] NPRM "Statement of Commissioner Andrew C. Barrett" at 1.

[23] Protecting reasonable reliance is, in fact, a principle that permeates the law. See, e.g., Restatement of the Law Second: Contracts § 90.

policies by "grandfathering" certain licensees.[24] At the very least, the agency should do the same here.

C. The Administrative Procedure Act Counsels Against Retroactive Rulemaking

"A rule that has unreasonable secondary retroactivity--for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule--may for that reason be 'arbitrary' or 'capricious,' see 5 U.S.C. § 706, and thus invalid."[25] For this reason, the Administrative Procedure Act ("APA") requires that rules look to the future. Thus, the agency may not change its Pioneer's Preference rules in a manner that seriously adversely

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[24] See, e.g., Redevelopment of Spectrum To Encourage Innovation in the Use of New Telecommunications Technologies, 8 FCC Rcd 6495 (1993) (providing grandfathering rights and transition procedures for microwave users in the Emerging Technologies band); Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket No. 93-252, FCC 93-454 (rel. Oct. 8, 1993) (proposing provisions to grandfather foreign ownership interests in commercial mobile service providers); "Channel Exclusivity to be Provided to Qualified Private Paging Systems at 929-930 MHz," FCC News Release (rel. Oct. 21, 1993) (adopting exclusivity rules that provide grandfathered status to pre-October 14 applications by existing systems).

[25] Bowen at 220 (Scalia, J., concurring). See, e.g., St. Bernard's Hospital, Inc. v. Sullivan, 781 F. Supp. 576, 590-91 (E.D.A Ark. 1991); see also Joint Comments of Advanced Mobilecomm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc., ET Docket No. 93-266, at 12 (filed November 15, 1993) (arguing that retroactive alteration of Pioneer's Preference rules violates Bowen's express intent test, which states that power to promulgate retroactive rules must be expressly delegated in authorizing legislation).

affects the substantial investments of holders of final Pioneer's Preference awards.

Any rule directing finalized Pioneer's Preference recipients to pay auction-level prices would wreak havoc with these recipient's reasonable expectations. It would, accordingly, be arbitrary and capricious.[26] So too would any other major modification of the benefits promised holders of a Pioneer's Preference.

Retroactive rulemaking is not only generally arbitrary and capricious, it is also disfavored by Section 551(H)(4) of the Administrative Procedure Act. That Section defines "rule" to mean "an agency statement of general or particular applicability and future effect." (emphasis added). The 1947 Attorney General's Manual on the Administrative Procedure Act ("AG's Manual"), considered an authoritative interpretation of the APA, explains Section 551(H)(4) as follows:

> Of particular importance is the fact that "rule" includes an agency statement not only of general applicability but also those of particular applicability applying either to a class or to a single person. In either case, they must be of future effect, implementing or prescribing future law.[27]

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[26] 5 U.S.C. § 706(2). See also National Assn. of Independent Television Producers and Distributors v. FCC, 502 F.2d 249, 255 (1974) ("Any implication by the FCC that this court may not consider the reasonableness of the retroactive effect of a rule is clearly wrong").

[27] AG's Manual at 13-14.

Altering the Pioneer's Preference rules retroactively would pervert the rulemaking process defined in 5 U.S.C. § 551(H)(4). It is therefore likely to be struck down by a reviewing court as arbitrary, capricious and an abuse of discretion.[28] The Commission should, accordingly, reject the requests to modify the grant of Mtel's Pioneer's Preference.

III. THERE IS NO LEGAL BASIS FOR REQUIRING SPECIAL PAYMENTS FROM PIONEER'S PREFERENCE HOLDERS EITHER RETROACTIVELY OR PROSPECTIVELY

The Commission has requested comment on whether it is "legally permitted to charge for a license obtained through the pioneer's preference process."[29] Congress's recent grant of authority to the FCC to use a competitive bidding process in awarding certain parts of the spectrum does not change the basis for computing other fees for licenses awarded in other contexts.[30] The terms of the grant are quite limited;

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[28] 5 U.S.C. § 706(2)(A).

[29] NPRM at ¶ 10.

[30] 47 U.S.C. § 158 mandates that fees charged for FCC licenses reflect the cost of regulation. The Commission has "noted that the charges [under 47 U.S.C. § 158] represent a rough approximation of the Commission's actual cost of providing the regulatory actions listed in new section 8(a) of the Communications Act." Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, Report and Order, 2 FCC Rcd 947, 948 (1987). The Commission has further explained that the fee schedule "could only be changed in accordance with the statute [to take inflation into account] or through the passage of new legislation. See also Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 309(j)(1), 107 Stat. 388 (1993).

competitive bidding can only apply when "mutually exclusive applications are accepted for filing."[31] Because Pioneer's Preference holders do not submit mutually exclusive applications,[32] such applicants are not subject to competitive bidding--or to fees based on competitive bidding.

The Commission recognized that Pioneer's Preference holders such as Mtel may not be charged for licenses when it said:

> Congress authorized use of competitive bidding methods only when multiple applications are filed that are mutually exclusive. Inasmuch as we have determined that a pioneer's preference application will be the sole application acceptable for filing for the specific license at issue, we believe that the statutory scheme, combined with our pioneer's preference as it currently exists, exempts pioneer's preference licensees from payment for a license so issued.[33]

This determination is entirely correct. The Commission's rules explain that applications will not be considered "mutually exclusive," if "conflicts are such that the grant of one application would effectively preclude . . . the grant of one or more of the other applications.[34] In other words, applications are only "mutually exclusive" if they are competing against other applications for a particular allotment of spectrum.

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[31] Id. (emphasis added).

[32] 47 C.F.R. § 1.402(b) (1992).

[33] NPRM at ¶ 10.

[34] 47 C.F.R. § 22.31(a) ("Mutually Exclusive Applications").

Pioneer's Preference applications do not compete against other applications. Pioneer's Preference applications are judged not against each other, but against the Commission's threshold criteria.[35] Therefore, they are not mutually exclusive.[36]

The limited nature of Congress's action is clear enough; in an excess of caution, however, Congress explicitly excluded the award of licenses to Pioneer's Preference holders from the competitive bidding process. Section 309(j)(6)(G) states that "[n]othing in this subsection, or in the use of competitive bidding shall . . . be construed to prevent the Commission from awarding licenses to those persons who make significant

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[35] The FCC's rule regarding Pioneer's Preferences expressly states that "[i]f awarded, the pioneer's preference will provide that the preference application for a construction permit or license will not be subject to mutually exclusive applications." 47 CFR § 1.402(d).

[36] Unfortunately, Southwestern Bell has attempted to blur this rather straightforward distinction. It states that "[w]hen only one user may occupy the Spectrum for a specified application, the proposals for its use are 'mutually exclusive applications.'" Southwestern Bell Corporation, Letter re: Personal Communication Services and Pioneer's Preference Issues, GEN Docket No. 90-314, at 2 (October 14, 1993). In its analysis, Southwestern Bell has confused the results of the application process with the application process itself. It is true that once Mtel receives a license--the result of the application process--it will be the sole user of that portion of the spectrum. However, it does not follow that Mtel's application is, therefore, mutually exclusive. As stated above, the term mutually exclusive application is used to denote an application that is competing against other applications for a particular spectrum allocation.

contributions to the development of a new telecommunications service or technology."[37]

The legislative history of this section further confirms that Pioneer's Preference holders may not be forced to bid for spectrum or be charged auction-level fees. In the budget reconciliation proceedings, the Senate Report stated with regard to Section 309(j)(6)(G) that:

> The FCC has been undertaking efforts to encourage the provision of new technologies and services by entrepreneurs and innovators. Consistent with the FCC's statutory obligations and its prior efforts in this regard, the Committee included language in this subsection which states that nothing prevented the FCC from awarding licenses to companies or individuals who make significant contributions to the development of a new telecommunications service or technology.[38]

Thus, in the absence of any provision subjecting Pioneer's Preference holders to the competitive bidding process, 47 U.S.C. § 158 establishes the appropriate level of application fees. And, as noted above, Section 158 directs that licensees may not be charged fees that exceed the Commission's costs of regulation.

CONCLUSION

For the reasons set forth herein, nothing in this review should affect final Pioneer's Preference grants. As the

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[37] 47 U.S.C. § 309(j)(6)(G), 107 Stat. 389-90.

[38] Reconciliation Submissions of the Instructed Committees Pursuant to the Concurrent Resolution of the Budget, S. Budget Rep. 103-36, 103d Cong., 1st Sess. 73 (1993).

Commission's Notice expressly recognizes, there are substantial equity interests at stake in final grants that should not be upset by prospective changes to the Pioneer's Preference rules. Indeed, as Mtel has shown, any such changes could violate well established Commission and Court precedents disfavoring retroactive rulemaking for reasons of equity. Similarly, the Commission should not heed those disappointed Pioneer's Preference applicants that attempt to impose limitations on the benefits of Mtel's final preference. These arguments misconstrue existing licensing policies and statutory language and fail to provide any cognizable factual or legal basis for ex post facto alteration of the terms of Mtel's final Pioneer's Preference.

Respectfully submitted,

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